



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2004

Ms. Florence R. Upton
Assistant City Attorney
Office of the City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2004-6759

Dear Ms. Upton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206671.

The City of San Antonio (the "city") received a request for copies of the 2003 tickets and any contact information used or generated for the people successfully contacted for the San Antonio Police Department ("SAPD") racial profiling telephone survey, as well as all related records. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (allowing interested party to submit written comments indicating why requested information should or should not be released).

You claim that the submitted information is subject to section 552.101, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory,

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

or by judicial decision.” This section encompasses information another statute makes confidential. Article 2.132 of the Code of Criminal Procedure requires each law enforcement agency in the state to “adopt a detailed written policy on racial profiling[.]” Code Crim. Proc. art. 2.132(b). Article 2.132 further provides that the policy must “require the agency to submit to the governing body of each county or municipality served by the agency an annual report of the information collected” about traffic stops in which a citation is issued and arrests resulting from those traffic stops. Code Crim. Proc. art. 2.132(b)(6), (7). Finally, article 2.132 provides that such a required report “may not include identifying information about a peace officer who makes a traffic stop or about an individual who is stopped or arrested by a peace officer.” Code Crim. Proc. art. 2.132(e).

Next, article 2.133 of the Code of Criminal Procedure provides in relevant part as follows:

(b) A peace officer who stops a motor vehicle for an alleged violation of a law or ordinance regulating traffic or who stops a pedestrian for any suspected offense shall report to the law enforcement agency that employs the officer information relating to the stop

Code Crim. Proc. art. 2.133(b). Article 2.134 provides in part that

[a] law enforcement agency shall compile and analyze the information contained in each report received by the agency under Article 2.133 . . . [and] shall submit a report containing the information compiled during the previous calendar year to the governing body of each county or municipality served by the agency in a manner approved by the agency.

Code Crim. Proc. art. 2.134(b). Article 2.134 further provides that “[a] report required under Subsection (b) may not include identifying information about a peace officer who makes a traffic or pedestrian stop or about an individual who is stopped or arrested by a peace officer.” Code Crim. Proc. art. 2.134(d). You claim that all of the submitted information is confidential under articles 2.132, 2.133 and 2.134. Attachment IV contains compiled information regarding traffic stops, and includes identifying information about peace officers as well as individuals cited in the traffic stops. Based on articles 2.132(e) and 2.134(d) of the Code of Criminal Procedure, you must withhold under section 552.101 of the Government Code those portions of the compiled information in Attachment IV that identify peace officers and individuals cited in traffic stops. We have marked this information accordingly. We find, however, that none of the remaining submitted information is confidential under article 2.132, 2.133 or 2.134. Therefore, we will address your other arguments against the disclosure of the remaining submitted information.

You claim that some of the remaining information in Attachment IV is excepted from disclosure pursuant to section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a

governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that portions of the information in Attachment IV reveal the substance of communications between attorneys for and representatives of the SAPD. You state that these communications occurred in the course of the rendition of professional legal services and were intended to be confidential. You indicate that the SAPD has maintained the confidentiality of the communications. Based upon these representations, we conclude that you may withhold the marked information under section 552.107.

You also claim that some of the information in Attachment IV is subject to section 552.111, which excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842

S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

You state that some of the responsive information in Attachment IV contains communications between SAPD personnel, consisting of advice, opinion and recommendations on policy making issues. Based on this assertion and our review of the information at issue, we conclude that the opinion portions of the correspondence in Attachment IV, which we have marked, may be withheld under section 552.111.

Lastly, the documents submitted as Attachment III contain information that must be withheld under section 552.130 of the Government Code², which provides, in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state of a local agency authorized to issue an identification document.

Therefore, the city must withhold the following information in Attachment III: Texas license plate number and year; Texas driver's license number and class; and Texas personal identification document number. We have marked a representative sample of this information accordingly. We note that section 552.130 does not except from disclosure an out-of-state license plate number or year, or an out-of-state driver's license number or class.

² The Office of the Attorney General will raise mandatory exceptions like section 552.130 on behalf of a governmental body but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the city must withhold under section 552.130 the types of Texas-issued information found in Attachment III that we have marked as a representative sample; the city must withhold the information we have marked in Attachment IV under section 552.101 of the Government Code in conjunction with articles 2.132(e) and 2.134(d) of the Code of Criminal Procedure; and the city may withhold the marked information in Attachment IV under sections 552.107 and 552.111. The city must release all remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

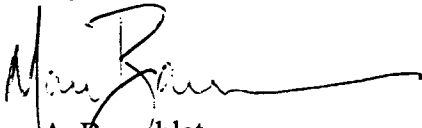
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/jh

Ref: ID# 206671

Enc. Submitted documents

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